

*a***ALL MALAYAN ESTATES STAFF UNION****v.****RAJASEGARAN VN RAJAH & ORS***b*

HIGH COURT MALAYA, KUALA LUMPUR

WAN AFRAH IBRAHIM JC

[JUDICIAL REVISION NO: R2-25-05-04]

2 NOVEMBER 2004

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LABOUR LAW: *Industrial Court - Chairman - Appointment - Validity of - Lack of 7 years' active practice - Whether appointment rendered invalid - Industrial Relations Act 1967, s. 23A*

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The claimant sought the removal of the 1st respondent as Chairman of the Industrial Court for not possessing the requisite qualifications as set out under s. 23A of the Industrial Relations Act 1967 ('IRA'). Section 23A thereof requires a person appointed as Chairman of the Industrial Court to have been in active practice for at least seven years prior to his appointment. It was not disputed that the 1st respondent was in actual practice for only four years nine months and 22 days although he was on the Roll of advocates and solicitors for more than eight years preceding his appointment. It was argued for the respondents that the phrase "active practice" was only relevant with regards to the issue of pupillage and the qualification of a master under ss. 13 and 21 of the Legal Profession Act 1976 ('LPA').

*e***Held (allowing the application):***f*

[1] The modern approach to interpreting statutes is by adopting the purposive approach. In adopting this approach, the court is entitled to refer to Hansard as an aid to interpretation when there is some ambiguity in the words of a statute or where a literal interpretation would lead to an absurdity. In introducing s. 23A IRA, Parliament clearly envisaged that the Chairman of the Industrial Court should not only be legally qualified but also possess some legal experience. (p 193 c-d, f)

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[2] It is not only the IRA that has to be purposively interpreted but the LPA as well. Only an advocate and solicitor who has been issued with a practicing certificate for at least seven years possesses the necessary legal experience and is an "advocate and solicitor" as envisaged under s. 23A IRA. (p 194 a, c)

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[3] The issue herein was not one of “active practice”. The quality of practice or experience of the 1st respondent was not in question; that was for the 2nd respondent to decide. The concern here was whether an advocate and solicitor had obtained the minimum legal experience required under the IRA. Mere admittance to the Roll of advocates and solicitors does not suggest legal experience. Admittance as well as having a practicing certificate for at least seven years raises the presumption that the candidate in question has the legal experience. (p 194 d-e)

[4] The case of *Samantha Murthi v. Attorney-General Malaysia & Ors* was distinguished. That case dealt with the definition of s. 3 LPA and that a pupil master would not require a practicing certificate. In the present case, it was decided that a practicing certificate was necessary to show that a candidate for chairmanship possesses the necessary legal experience. (p 194 f)

Case(s) referred to:

Akberdin Hj Abdul Kader & Anor v. Majlis Peguam Malaysia [2002] 4 CLJ 689 CA (refd)
Black v. Shaw [1913] 33 NZLR 194 (refd)
Chor Phaik Har v. Farlim Properties Sdn Bhd [1994] 4 CLJ 285 FC (refd)
Mubarak Mazdoor v. KK Banerji AIR [1958] Allahabad 323 (refd)
Samantha Murthi v. Attorney-General Malaysia & Ors [1982] 2 MLJ 128 (dist)

Legislation referred to:

Industrial Relations Act 1967, s. 23A(1), 23(2)
Legal Profession Act 1976, ss. 3, 13, 21, 32

For the appellant - P Kuppusamy (VK Raj); M/s P Kuppusamy & Co
For the respondents - Azizah Nawawi; AG's Chambers
Anand Ponnudurai - watching brief
Reported by Usha Thiagarajah

JUDGMENT

Wan Afrah Ibrahim JC:

The first respondent is presently a Chairman of the Industrial Court and is presiding over an employment dispute in the Industrial Court involving the applicant. Before his present appointment he was admitted as an advocate and solicitor of the High Court on 15 December 1995 and remained so until the day of his appointment to his present position on 15 January 2004. The first respondent only commenced practice as an advocate and solicitor on 1 April 1996 and ceased practice on 23 January 2001. However, despite being on the Roll of advocates and solicitors for more than eight years, he was only in actual practice for four years nine months and 22 days (as confirmed by the Malaysian Bar Council). None of these facts are in dispute.

- a* The applicant has now filed an application for judicial review claiming for the following reliefs:
- (a) a writ of *quo warranto* for the purpose of disqualifying the first respondent as a Chairman of the Industrial Court;
- b* (b) a declaration that the appointment of the first respondent, as a Chairman of the Industrial Court by the second and third respondents is null and void and of no legal effect;
- c* (c) an order of mandamus directed to the second and third respondents to rescind or revoke the appointment of the first respondent, as a Chairman of the Industrial Court;
- (d) an order directed to the second and third respondents to stay the appointment of the first respondent, as a Chairman of the Industrial Court until the disposal of this court's decision.
- d* (e) that an injunction be granted to restrain the first respondent from exercising the powers, duties and functions of a Chairman of the Industrial Court and from claiming any rights, privileges or emoluments attached to that office;
- e* (f) If necessarily, further or other consequential orders and directions; and
- (g) Costs of this application be costs in the cause.

- Clearly the essence of the claimant's application is to seek the removal of the first respondent from his position as a Chairman of the Industrial Court. The
- f* gist of the claimant's argument is as follows: s. 23A of the Industrial Relations Act 1967 (the Act) provides that a person appointed as a Chairman of the Industrial Court should have been in active practice for at least seven years prior to his appointment. Since the first respondent does not possess the requisite qualifications as set out under the said provision, his appointment is
- g* null and void. The Attorney General that appears on behalf of the respondents disputes the claimant's argument and submits that the appointment of the first respondent was proper and in accordance with the said provision. The second respondent has even deposed an affidavit stating to the effect that it found the first respondent to be sufficiently qualified for his appointment as a
- h* Chairman of the Industrial Court. That may be the second respondent's view, but it is ultimately for this court to decide whether or not the first respondent is qualified under the said provision.

- The crux of this issue in this application revolves around the statutory construction of the s. 23A(1) of the Act which provides as follows:
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23A. (1) A person is qualified for appointment as President under section 21(1)(a) and as Chairman under section 23(2) if, for the seven years preceding his appointment, he has been an advocate and solicitor within the meaning of the Legal Profession Act 1976 [Act 166] or a member of the judicial and legal service of the Federation or of the Legal service of a State, or sometimes one and sometimes another.

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The Applicant's Submission

The applicant's counsel has urged this court to appreciate the historical basis for the introduction of this provision which was introduced by the Industrial Relations (Amendment) Act 1989 (Act A718) and came into force on 10 February 1989.

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He has submitted that prior to the amendment, the qualifications of a Chairman of the Industrial Court was not specified. All appointments were made pursuant to s. 23(2) of the Act which gave the Yang Di-Pertuan Agong the discretion to appoint any person as a Chairman regardless of their qualifications (or lack of). Therefore, prior to the introduction of s. 23A, candidates without any legal qualifications but with sufficient practical experience were eligible for appointment to the position. Counsel submits that the qualifications for this position have now been substantially altered with the introduction of the said provision.

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Counsel further submits that if the wording and the basis for the introduction of s. 23A were scrutinized and appreciated, it is clear that a person appointed as a Chairman of the Industrial Court must not just be admitted to the Rolls of advocates and solicitors for at least seven years but must be in practice for at least seven years. It should be noted that even though the applicant sought to argue during written submissions that a candidate for chairmanship should possess the requisite qualification immediately preceding his appointment; this line of submission was understandably discontinued during oral submissions.

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Counsel submitted that since the first respondent was only in active practice for a total of four years nine months and 22 days, he clearly does not meet the qualifications as set out under s. 23A of the Act. Additionally, it was not clear what the first respondent did from the time he ceased practice on 23 January 2001 until his appointment.

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Now, this court was also urged to refer to the Hansard in interpreting the provision in question and relies on the Federal Court decision of *Chor Phaik Har v. Farlim Properties Sdn Bhd* [1994] 4 CLJ 285 where Edgar Joseph Jr. FCJ held as follows:

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- a* Nevertheless, we have arrived at the conclusion that we should follow the recent trend of the cases decided in the United Kingdom, Australia, New Zealand and Singapore and permit a relaxation of the exclusionary rule by allowing a reference to Hansard as an aid to statutory interpretation where the enactment is ambiguous or obscure, or which if literally construed might lead to absurdity
- b* ...
- Counsel has also submitted that in interpreting statutes, the purposive approach should be adopted and cited the Court of Appeal decision of *Akberdin Hj Abdul Kader & Anor v. Majlis Peguam Malaysia* [2002] 4 CLJ 689 where Gopal Sri Ram JCA said the following:
- c* In our judgment the approach to interpretation of the Act should be purposive. Indeed Mr. Wong readily conceded in the argument before us yesterday that the purpose of the Act is to protect the public from incompetent members of the legal profession. Once it is accepted that the Act is there to protect the public, then we cannot in the present case accede to the invitation to apply a
- d* literal interpretation to s. 13(1) because that would defeat the intention of Parliament.
- Additionally, we observe that the modern approach to statutory interpretation is purposive not literal. Indeed the abandonment of the literal approach these days is evidenced by the speech of Lord Griffiths in *Pepper v. Hart* [1993] 1 All ER 42. This is what his Lordship said at p. 50 of the report:
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- The days have long passed when the courts adopted a strict constructionist view of interpretation which required them to adopt the literal meaning of the language. The courts now adopt a purposive approach which seeks to give effect to the true purpose of legislation and are prepared to look at much extraneous material that bears on the
- f* background against which the legislation was enacted.
- Although the learned Judge did not say so in so many words, he did in fact apply a purposive construction to the language of s. 13(1). He therefore adopted the correct approach and, as we have earlier said, we are in agreement with him on his conclusion.
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- Counsel for the applicant then submitted that the next phrase that needs interpretation in s. 23A(1) is "... has been ...". He contended that this will help determine whether the first respondent ought to have been in "active practice" for the relevant seven years. Reference was made to the decision of
- h* *Mubarak Mazdoor v. K.K. Banerji*, AIR 1958, Allahabad 323 where the court interpreted the phrase "has been" in the context of either being an advocate, pleader or judge. In this decision, the court considered the phrase "has been a judge" in a petition challenging the appointment of the respondent to the Election Tribunal. The court observed thus:
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The petitioners contention is that the proviso to s. 86(3) must be interpreted strictly according to the rules of grammar and that when so interpreted, the words, “has been” (in the phrase ‘has been a Judge’) signify that the person eligible for appointment must not only have held, but be then holding office as a Judge; and that accordingly a retired Judge is not eligible for appointment. This argument is based on the assumption that ‘has been’ is a present perfect continuous tense. This assumption in our opinion is not correct. ‘Has been’ when not followed by a participle is the present perfect tense of “to be”, and accordingly indicates that the state of being has existed and may be (but not necessarily is) continuing ...

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We are clearly of the opinion that the phrase “a person who has been a Judge” means a person who has at some time, held office as a Judge, but that it does not necessarily mean that the person must be holding office as a Judge at the time of his appointment as a member of the tribunal.

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Later in the judgment, the court said as follows:

We are accordingly of the opinion that the person whom the Election Commission is empowered to appoint under sub-s. (3) of s. 86 as it now stands is a person who has held office as a Judge of a High Court. It is immaterial whether that person is a retired Judge; the requirement is that he has held the office of a Judge.

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The Senior Federal Counsel's Submission

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The learned Senior Federal Counsel disputes the claimant’s interpretation of s. 23A of the Act and submits that the provision sets out 4 different criteria that should be fulfilled before a person is qualified to be a Chairman of the Industrial Court. She argues that such a person must, for seven years preceding his appointment must be:

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- (a) an advocate and solicitor within the meaning of the LPA 1976;
or

- (b) a member of the judicial and legal service of the Federation; or

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- (c) a member of the legal service of a State; or

- (d) sometimes one and sometimes another.

She proceeds to argue that s. 3 of the Legal Profession Act 1976 (LPA) has provided a definition of an ‘advocate and solicitor’:

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3. In this Act unless the context otherwise requires:

‘advocate and solicitor’ and ‘solicitor’ where the context requires means “an advocate and solicitor of the High Court admitted and enrolled under this Act or under any written law prior to the coming into operation of this Act.”

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- a* She then submits that since s. 3 LPA provides the statutory definition of the term ‘advocate and solicitor’ then all reference made to this phrase in other federal laws, including the provision in question, must be in reference to this statutory definition. Thus, in the context of the said provision, reference to ‘advocate and solicitor within the meaning of the Legal Profession Act 1976’
- b* can only mean the statutory definition in s. 3 LPA.

- Learned Senior Federal Counsel notes that s. 3 LPA uses the word ‘means’ to define ‘advocate and solicitor’ and submits that when the definition of a word in an act of Parliament uses the word ‘means’, it limits the meaning of the word to what is set out in the definition. Therefore, the definition of
- c* ‘advocate and solicitor’ must be limited to a person duly ‘admitted and enrolled under the Act.’ In view of this, the issue of ‘active practice’ does not arise at all in s. 3. Reliance was placed on the decision of *Black v. Shaw* [1913] 33 NZLR 194, where Justice Dennison said:

- d* ‘Means’ ... must be taken to rigidly define and limit the meaning of the word, in that part of the section in which the interpretation is made applicable, to the actions enumerated, to the exclusion of any others.

- Reference was also made to the decision of *Samantha Murthi v. Attorney-General Malaysia & Ors* [1982] 2 MLJ 128 where the issue before the Federal
- e* Court was the interpretation of s. 13(1) LPA. The objection to the appellant’s admission is that the Master, Mr. Reddy was not an advocate and solicitor under s. 3 of the LPA as he does not hold a practicing certificate under s. 29 LPA authorizing him to practice at the Malayan Bar. Learned Federal Counsel submitted in the above case the Federal Court held that so long as Mr. Reddy
- f* has been ‘admitted and enrolled’ under the Act or any previous law, he is an advocate & solicitor within the LPA.

- There is not even a requirement for a practicing certificate as the same is only a requirement of s. 29 of the same Act. Therefore she further submits the phrase ‘advocate and solicitor within the meaning of the Legal Profession Act 1976’ in s. 23A of the Act can only mean an advocate and solicitor within
- g* the meaning of the statutory definition of s. 3. As such, the only requirement in the provision is that the first respondent must have been admitted and enrolled under the LPA. There is no requirement that the person been in active practice since there is nothing in the provision that imposes a qualification of
- h* “active practice” as an advocate and solicitor a prerequisite for appointment as a Chairman.

- The phrase ‘active practice’ is only confined to ss. 13 and 21 LPA. The said phrase is not part of the statutory definition. The said phrase is only relevant with regards to pupillage and the qualification of a master under s. 13 and 21
- i* LPA.

She further contends on the face of the unambiguous clear words of s. 23A of the Act read together with s. 3 LPA, it would be wrong in law, under the circumstances, to read into s. 23A of the Act the words 'active practice'. Since the first respondent was admitted to the Roll of advocates and solicitors for more than eight years preceding to his appointment, he was suitably qualified.

The Court's Decision

It is apparent from the submissions of both parties that on the one hand, the applicant is urging this court to apply the purposive approach whilst on the other hand, the respondents is advocating the literal approach in interpreting s. 23A of the Act. Having considered both these submissions, I am inclined to agree with the applicant's submissions. As mentioned in the Court of Appeal decision of Akbardin Hj. Abdul Kader, the modern approach to interpreting statutes is by adopting the purposive approach. I also agree that in adopting the approach, this court is entitled to refer to Hansard as an aid to interpretation when there is some ambiguity in the words of a statute or where a literal interpretation would lead to an absurdity. I believe that taking a literal approach to the provision in question would lead to an absurdity. The then Deputy Minister of Labour Dato' Wan Abu Bakar bin Wan Mohamad had this to say when addressing the President of the Senate during the introduction of Act A781:

Tuan Yang Di Pertua, perbicaraan di Mahkamah Perusahaan masa kini semakin menjadi lebih legalistic, dengan izin. Oleh itu, adalah dicadangkan Presiden dan semua Pengerusi Mahkamah Perusahaan hendaklah berkelulusan undang-undang dan berpengalaman sekurang-kurangnya 7 tahun sebagai peguambela dan peguamcara atau telah berkhidmat selama 7 tahun dalam Perkhidmatan Perundangan dan Kehakiman ataupun di dalam keduanya perkhidmatan sekali. Pindaan ini adalah dicadangkan dalam Fasal 12.

Therefore clearly in introducing the provision in question, Parliament had in mind that Chairman of the Industrial Court should not only be legally qualified but possess some legal experience. Just because an advocate and solicitor is admitted to the Roll of advocates and solicitors, it does not necessarily mean that he will as a matter of course acquire legal experience. What the Senior Federal Counsel appears to have overlooked is unlike a person who was a member of the judicial and legal service of the Federation or a member of the legal service of a State for at least seven years, a person can be an 'advocate and solicitor' by definition and not be in practice at all. If the person were in one of the former positions, he would undoubtedly possess legal experience after at least seven years in practice.

- a* So it is not just the Act that has to be purposively interpreted but the LPA as well. Before an advocate and solicitor is allowed to practice he has to first obtain a practicing certificate. This certificate is issued by the Registrar of the High Court and the advocate and solicitor would have to comply with the requirements of s. 29 LPA. He would have to submit a declaration of the name
- b* under which he practices, or the name of the firms of advocate and solicitor employing him, the last practicing certificate and the relevant fees paid. Further, he has to ensure that he has also complied with the requirements set out in s. 32 LPA. To my mind, only when an advocate and solicitor has obtained a practicing certificate can he be assumed to be in practice and therefore
- c* accumulated legal experience. In view of this, I am of the view that only an advocate and solicitor who has been issued with a practicing certificate for at least seven years would possess the legal experience and be an 'advocate and solicitor' as envisaged under s. 23A of the Act.

- d* I agree with the learned Senior Federal Counsel that there is nothing in the provision or the Act that explicitly stipulates 'active practice' as done in ss. 13 and 21 LPA. However, I feel that the issue here is not one of 'active practice'. The court is not interested in the quality of practice or experience of the candidate; that is for the second respondent to decide. The court is only interested in whether an advocate and solicitor has obtained the minimum legal
- e* experience required under the Act. Being merely admitted to the Roll of advocates and solicitors does not suggest the candidate would have legal experience. Being admitted as well as maintaining a practicing certificate for at least seven years would raise the presumption that he has legal experience.

- f* The case of *Samantha Murthi* cited by learned Senior Federal Counsel can be distinguished from this case. In that decision, the Federal Court in that case was dealing with the definition of s. 3 LPA in respect of whether a pupil master would require a practicing certificate and decided that practicing certificate for the master was not necessary. In this case, I have decided that a practicing certificate is necessary to show that a candidate for chairmanship
- g* possesses legal experience.

In view of the above, clearly the first respondent is not a qualified person as envisaged under s. 23A of the Act. Prayers (a), (b), (c), (e) and (g) of the application are allowed.

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